Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1993

BRENDA L. SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

James R. Wyrsch
(Counsel of Record)
Cheryl A. Pilate
WYRSCH ATWELL MIRAKIAN
LEE & HOBBS, P.C.
1101 Walnut, Suite 1300
Kansas City, MO 64106
Tel: (816) 221-0080
Fax: (816) 221-3280
Attorneys for Petitioner

Service Printing and Graphics, Inc.
(816) 842-9068 • FAX (816) 842-4763

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QUESTION PRESENTED

I. WHETHER A DEFENDANT IN A COMPLEX FRAUD CASE CAN PROPERLY BE DENIED A GOOD FAITH DEFENSE INSTRUCTION ON THE BASIS THAT HER STATED GOOD FAITH BELIEFS DO NOT PERTAIN TO ALL ACTS ALLEGED BY THE GOVERNMENT, EVEN THOUGH THE DEFENDANT DENIED PARTICIPATING IN SOME ACTS, AND STATED THAT SHE OPERATED ON A GOOD FAITH BASIS WITH REGARD TO OTHER ACTS; AND WHETHER SUCH DENIAL VIOLATES THE FIFTH AND SIXTH AMENDMENTS TO THE U.S. CONSTITUTION.

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CITATIONS TO OFFICIAL REPORTS OF OPINIONS IN CASE

The primary opinion of the United States Court of Appeals for the Tenth Circuit whose review is sought by Petitioner was decided and filed on January 6, 1994. The opinion is reported as *United States v. Smith*, 13 F.3d 1421 (10th Cir. 1994), and is set forth in the Appendix at pages App. ii - App. xix. Petitioner also seeks review of a related judgment issued by the Tenth Circuit in which the Court held that because it affirmed the Defendant's conviction in the opinion filed on January 6, 1994, it also affirmed the District Court's Final Order of Forfeiture. That opinion is reported as *United States v. Smith*, 19 F.3d 485 (10th Cir. 1994), and is set forth in the Appendix at pages App. xxiii. Smith's case originated in the federal District Court in the District of Kansas. *United States v. Smith*, Case No. 92-20011-01 (D. Kan., final judgment entered May 24, 1993). The opinion of the United States District Court for the District of Kansas denying Petitioner's Motion for Judgment of Acquittal or, in the Alternative, for New Trial, was decided and filed on April 28, 1993. That opinion, *United States v. Smith*, Case No. 92-20011-01 (D. Kan. April 28, 1993), is set forth in the Appendix at pages App. xxviii- xlvii. The Final Order of Forfeiture entered by the District Court was filed on September 16, 1993. That opinion is set forth in the Appendix at pages App. xlviii - xlix.

STATEMENT OF JURISDICTION

The appeal of *United States v. Smith*, whose review Petitioner seeks, was decided by a panel of the United States Court of Appeals for the Tenth Circuit on January 6, 1994. *United States v. Smith*, Case No. 93-3159 (10th Cir. Jan. 6, 1994). *See* App. at ii-xix. Petitioner requested, and was granted, an extension of time in which to file her Petition for Rehearing. *See* App. at xxv.[1] Said Petition, which requested rehearing by the panel and rehearing en banc, was denied on May 13, 1994. *See* App. at xxv. The U.S. Supreme Court has jurisdiction to review this Petition for Writ of Certiorari, *see* 28 U.S.C. § 1254(1) (1988).

Petitioner also seeks review of the opinion of the Tenth Circuit filed on February 22, 1994, in which that Court affirmed the criminal forfeiture in Petitioner's case on the basis that it had previously affirmed her conviction. *United States v. Smith*, Case No. 93-3307 (10th Cir. Feb. 22, 1994) (hereinafter referred to as "case number 93-3307"). *See* App. at xxiii. *See* Sup. Ct. R. 12.2. The parties had, with the Court's approval, filed no separate briefs in case number 93-3307, which the Tenth Circuit had earlier consolidated, for procedural purposes, with Petitioner's main appeal. *See* App. at xxvii.

This second appeal, case number 93-3307, was docketed after Petitioner had filed a second notice of appeal, appealing the District Court's Final Order of Forfeiture. See App. at xlvii. The forfeiture was final as to Petitioner when final judgment was entered on May 24, 1994. However, the Court entered the Final Order of Forfeiture after adjudication of third-party interests. Petitioner filed her second Notice of Appeal in the interest of caution and to preserve her position, stated in her brief appealing her criminal conviction, that should the

[1] All references to the Appendix contained with this Petition shall be to "App. at ____".

appellate court reverse her conviction on the underlying counts, it must necessarily reverse the criminal forfeiture as well. Petitioner raised no separate issue as to the forfeiture.

After the Tenth Circuit issued its opinion on February 22, 1994, affirming the forfeiture on the basis that it had earlier affirmed Petitioner's criminal conviction, Petitioner did not file a petition for rehearing as there was no issue to rehear.

As stated above, Petitioner h[illegible]led, however, a Petition for Rehearing with regard to the Opinion issued January 6, 1994. The Tenth Circuit denied that Petition on May 13, 1994. See App. at xxv.

Petitioner files this writ timely (within 90 days from the denial of the rehearing petition, as permitted by Supreme Court Rule 13) with regard to the January 6, 1994, opinion of the Tenth Circuit. However, she is not within the 90-day time period with regard to the opinion in case number 93-3307, filed February 22, 1994. Petitioner nonetheless seeks review of the February 22, 1994, opinion on the basis that it is closely intertwined with the January 6, 1994, opinion, and Petitioner's petition is timely with regard to the latter opinion. Petitioner also submits that the 90-day time period is not jurisdictional in a criminal case, *see*, e.g., 28 U.S.C. § 2101(d). The forfeiture at issue is a criminal forfeiture and was charged in the indictment. Further, Petitioner represents that her counsel has spoken with the attorney for the Government, Mr. Robin Fowler, and he does not oppose her effort to seek review of both opinions of the Tenth Circuit. If this Court were to grant this Petition for Writ of Certiorari and reverse Petitioner's conviction, Petitioner asserts that the criminal forfeiture based on that conviction similarly should be reversed as a matter of law. *See also*, 18 U.S.C. § 982 (forfeiture dependent on other conviction, which in this case is money laundering, which depends on the mail fraud.)

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF CASE

A. Procedural Statement of the Case

This prosecution concerned an alleged scheme to use a travel agency to issue supposedly fraudulent tickets, refunds, and exchange notices for the purpose of depriving the airlines of money that they claimed belonged to them. On April 22, 1992, the Government filed a Superseding Indictment charging Defendant Brenda Lu Smith, along with four others, with conspiring to fraudulently use the access or account codes of Globemaster Travel to obtain more than $500,000.00

in airline tickets and refund checks, in violation of 18 U.S.C. §§ 371 and 1029(b)(2). The Superseding Indictment also charged Smith with two counts of mail fraud in violation of 18 U.S.C. § 1341, three counts of money laundering in violation of 18 U.S.C. §§ 1957 and 2, one count of criminal forfeiture pursuant to 18 U.S.C. § 982(b)(1), and one count of failure to file a corporate income tax return in violation of 26 U.S.C. § 7203.

Prior to trial, the District Court dismissed Count I on the basis that it failed to state an offense because there was no allegation that the defendants obtained the access devices or account codes with fraudulent intent. After a four-week trial, a jury convicted Smith of the remaining counts. The District Court subsequently granted Smith an acquittal on the tax count on the basis that the evidence was insufficient for a conviction. *United States v. Smith*, Case No. 92-20011-01 (D. Kan. Apr. 28, 1993); App. at xxviii.

On May 20, 1993, the District Court sentenced Smith to 48 months in prison, three years supervised release, and imposed a special assessment of $250.00 and a fine of $75,000.00. The Court entered final judgment on May 24, 1993, and the Defendant filed a timely Notice of Appeal on that same day.

After the Defendant filed her opening brief in the Tenth Circuit, but before the appellate court issued any ruling, the District Court entered a Final Order of Forfeiture on September 16, 1993. *See* App. at xlviii. The Final Order of Forfeiture was entered pursuant to the provisions of 21 U.S.C. § 853(n) and was issued after notice to third parties with a potential interest in the $128,177.00 forfeited by the Defendant. (These funds were forfeited via a criminal forfeiture count brought as Count VII of the Superseding Indictment.) Because the forfeiture was final as to the Petitioner at the time the District

Court entered its final judgment on May 24, 1994, Petitioner believed that it was not necessary for her to file a second notice of appeal stating her intent to appeal from the forfeiture order. However, in the exercise of caution, she elected to file a second notice of appeal. Petitioner thus had two appeals docketed in the Tenth Circuit Court of Appeals. The Tenth Circuit consolidated these appeals for procedural purposes. *See* App. at xxvii.

On January 6, 1994, the Tenth Circuit entered its opinion affirming the jury's verdict. *United States v. Smith*, 13 F.2d 1421 (10th Cir. 1994); *see* App. at ii - xix. Petitioner timely requested a two-week extension of time in which to file her Petition for Rehearing. On February 2, 1994, she filed her Petition for Rehearing by the panel and her suggestion for rehearing en banc.

On February 22, 1994, the Tenth Circuit filed a second, one-paragraph opinion, which affirmed the District Court's Final Order of Forfeiture on the basis that the Tenth Circuit had earlier affirmed the Petitioner's conviction. *See* App. at xxiii. The Petitioner did not file a Petition for Rehearing with regard to the February 22, 1994, Order, as there was no issue to rehear with regard to this opinion.

On May 13, 1994, the Tenth Circuit Court of Appeals granted Petitioner's Motion for Extension of Time in which to File Her Petition for Rehearing with regard to the January 6, 1994, opinion. *See* App. at xxv. In this same order, the Tenth Circuit denied Petitioner's Petition for Rehearing by the panel and her suggestion for rehearing en banc. *See* App. at xxv. This order applied only to the opinion filed on January 6, 1994.

Petitioner submits this Petition for Writ of Certiorari seeking review of both the January 6, 1994, and the February 22, 1994, opinions of the Tenth Circuit. Although she is within the 90-day period allotted by Rule 13 with regard to the Janu-

ary 1994 opinion (as measured from the May 13, 1994, denial of her Petition for Rehearing), she is not timely with regard to the February 22, 1994, opinion. However, Petitioner seeks review of both opinions because they are closely intertwined and the decision in the February 22, 1994, opinion is, in fact, dependent upon the decision rendered in the January 6, 1994, opinion. For a fuller discussion of Petitioner's reasons for seeking a review of both opinions, she refers this Honorable Court to the discussion that appears under the heading "Statement of Jurisdiction," *supra.*

B. Factual Statement of the Case

The charges in this case arose from the Petitioner's operation of the Globemaster Travel Agency in Overland Park, Kansas, and her alleged efforts to devise and direct a scheme to defraud foreign and domestic airlines by purchasing numerous airline tickets on a credit card or for cash, then claiming multiple refunds for individual tickets. The evidence presented at trial showed that Petitioner purchased Globemaster Travel in 1978 and sold the agency to local investors seven years later. After the sale, she continued to manage the agency's affairs. Globemaster Travel was a member of the Airline Reporting Corporation (ARC), an intermediary that assists in the transmission of paperwork and funds between the airlines and travel agencies. ARC provided Globemaster with the items that it needed to sell tickets, including blank ticket stock, access to reservations terminals, and an account number with which to validate tickets. Each week, Globemaster was required to mail to ARC a report of its cash and credit sales, its refunds, ticket exchanges and earned commissions. From the documentation provided, ARC would determine the net amount of money Globemaster owed to the airlines. ARC was responsible for collecting and transmitting the proceeds of cash transactions, but did not collect funds

for credit card sales, as credit transactions were handled by the agency, the credit card company, and the airline. From the weekly reports, ARC determined how much the agency owed each airline, deducting from the total cash sales the amount of total cash refunds and commissions. ARC would then withdraw funds from the travel agency's bank account, based on a weekly draft authorization provided with the report to ARC. The net proceeds would then be distributed to the various airlines whose tickets were sold by the agency.

At trial, the Government offered evidence seeking to prove that Smith and Globemaster Travel employees acting at her direction wrote fraudulent foreign airline tickets that they subsequently claimed had been refunded. The Government offered evidence showing that the amount of foreign ticket refunds exceeded the amount of foreign ticket sales claimed. The Government alleged that this was accomplished by Globemaster employees who claimed multiple refunds for each ticket. This created a so-called "pool of credits" in the form of monies that should have been withdrawn by ARC but were not. This "pool" was then supposedly tapped by the writing and cashing in of fraudulent domestic airline tickets.

In early May 1989, Smith purchased six foreign airline tickets using her personal American Express card. These tickets were issued in names other than Brenda Smith's name. The total gross purchase price of these tickets was $50,802.82. Because these tickets were reported to ARC as credit card sales, ARC did not withdraw money from the Globemaster account and the airlines were paid directly by American Express.

Over the next four weeks, Globemaster Travel issued 12 foreign airline tickets, again in the name of fictitious passengers. These 12 tickets were reported to the ARC as cash sales and, thus, were paid for when the ARC withdrew the

appropriate amount of funds from Globemaster's bank account. The gross purchase price of the 12 tickets was $105,694.62.

On the ARC weekly reports, these 18 tickets were subsequently reported as cash refunds. In any particular week, the amount of cash ticket sales reported to ARC would be offset by the amount of reported refunds, and ARC would thus withdraw less money to reflect the refunds. According to evidence presented by the government, these original 18 conjunctive tickets were used to support the issuance of an additional 78 foreign airline tickets. This was accomplished by the alleged splitting of the original 18 tickets. For instance, one multiple-coupon, multiple-leg ticket would be treated as if it were several tickets and would be refunded multiple times, each time for the total ticket price.

The government presented evidence showing that the alleged splitting of tickets resulted in the creation of a "pool of credits" in Globemaster Travel's account. This pool of credits was then accessed by the issuance of domestic airline tickets that were cashed in by persons who testified that they acted at the direction of Petitioner. Tickets were issued by the travel agency and were reported as cash sales; thus, ARC withdrew money out of Globemaster Travel's bank account and paid the domestic airlines. These domestic airline tickets were cashed at various domestic airline counters.

Up until the last two weeks of June 1989, the domestic airlines were paid for all tickets issued by Globemaster. However, during the last part of June 1989, the ARC "reversed" two weekly reports of Globemaster Travel, meaning that ARC distributed no money to the airlines for any of the tickets reportedly sold by Globemaster during those two weeks and collected no money from the airlines for any cash refunds reported by Globemaster during those same two weeks.

The government alleged that the so-called scheme executed by Smith and others supposedly acting at her direction resulted in net losses of approximately $389,230.00 to the foreign airlines and approximately $184,533.00 to the domestic airlines.

Smith testified extensively in her own defense. She stated that she was unaware of and had no involvement in any plan to create a "pool" of credits in the Globemaster bank account by claiming multiple refunds for foreign airline tickets. She testified that she had authorized, however, the purchase of several foreign airline tickets worth approximately $100,000.00 on her American Express card, and the subsequent claiming of cash refunds for those same tickets so that Globemaster could obtain the benefit of a 60-day payment period available for the use of the credit card. She stated that when Globemaster began to experience cash flow problems and owed money to two banks, she developed a plan to use her American Express card to purchase tickets that would not be used for travel and would be reported to ARC as cash refunds, with the refund amount being used to reduce the weekly liability to ARC. The Petitioner testified that she did not intend to steal any money, and simply intended to access her American Express card to obtain a legitimate 60-day credit float. Petitioner further testified that she kept proper records for these tickets, that she considered herself a legitimate customer of the airlines, and that she had intended to keep using credit available through American Express until the agency's cash flow improved and she was able to pay the outstanding balance on the credit card.

Petitioner offered a proper good faith defense instruction, which was denied by the district court on the basis that her defense was more properly characterized as denial, rather than good faith. *See* App. at xxviii, xlii - xliii, l - li.

REASONS FOR GRANTING THE WRIT

I. WHETHER A DEFENDANT IN A COMPLEX FRAUD CASE CAN PROPERLY BE DENIED A GOOD FAITH DEFENSE INSTRUCTION ON THE BASIS THAT HER STATED GOOD FAITH BELIEFS DO NOT PERTAIN TO *ALL* ACTS ALLEGED BY THE GOVERNMENT, EVEN THOUGH THE DEFENDANT DENIED PARTICIPATING IN SOME ACTS, AND STATED THAT SHE OPERATED ON A GOOD FAITH BASIS WITH REGARD TO OTHER ACTS; AND WHETHER SUCH DENIAL VIOLATES THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION.

Granting of a Petition for Writ of Certiorari is proper, *inter alia*, when a United States Court of Appeals has rendered a decision that is in conflict with a decision of this Court or has decided an important question of federal law which has not been, but should be, settled by this Court. In this case, Petitioner asserts that the Tenth Circuit, without authority or precedent, has announced an extraordinary new rule that dramatically restricts the availability of the good faith defense in complex fraud cases. *See, United States v. Smith*, 13 F.3d 1421 (10th Cir. 1994); App. at ii - xix. In essence, a panel of the Tenth Circuit held that a defendant is not entitled to a good faith defense instruction in a mail fraud case unless the defendant's stated good faith beliefs pertain to all, or nearly all, of the acts alleged by the Government. This rule necessarily precludes a defendant from denying participation in some of the alleged acts if he or she also wishes to rely on a good faith defense.

Petitioner asserts that the Tenth Circuit's decision is inconsistent with this Court's decision in *Matthews v. United States*, 485 U.S. 58 (1988), which held that defendant raising an entrapment defense is entitled to an instruction as to that

defense even if it is logically inconsistent with another defense raised by the defendant. *Id.* at 63-66. If a defendant is entitled to an instruction on a defense that is logically inconsistent with another defense he has raised, then he also must be entitled to instructions on two separate defenses that go to separate aspects of the Government's evidence. Petitioner further submits that the Tenth Circuit's rule, as announced in *Smith*, also transgresses a defendant's constitutional rights to due process and a fair trial, in that it interferes with a defendant's ability to mount a defense of his or her choosing.

It is unquestioned that the defendant has the right to select a theory of defense and to present relevant evidence in support of that theory. The defendant may even present inconsistent defenses. *See, e.g., Matthews*, 485 U.S. at 64; *Arcoren v. United States*, 929 F.2d 1235, 1245 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 312 (1991). It also is unquestioned that the defendant has the right to have the jury instructed on his theory of defense, provided that he proffered a proper instruction and the instruction finds some support in the evidence. *Matthews*, 485 U.S. at 63. *See also United States v. Scafe*, 822 F.2d 928, 932 (10th Cir. 1987). The defendant's entitlement to a proper instruction is so complete that this Court held in *Matthews* that the defendant may obtain a proper instruction on a particular theory of defense (entrapment) even when that theory is flatly inconsistent with another defense (denial) raised by the defendant. *Matthews*, 485 U.S. at 63-66. *See also United States v. Sullivan*, 919 F.2d 1403, 1417-18 (10th Cir. 1990) (following *Matthews*).

In direct conflict with basic, well-established principles, the Tenth Circuit has declared, in essence, that a defendant cannot obtain a good faith defense instruction unless the defendant's stated good faith beliefs hew to the parameters of the alleged fraudulent scheme — regardless of whether the defendant admits participating in all aspects of the alleged

scheme. Specifically, the Tenth Circuit stated:

> Implicit in our formulation of the good faith defense to charges of mail fraud is the requirement that for there to be "'sufficient' evidence to support the theory," *Hopkins*, 744 F.2d at 717, the quantum of evidence must embrace the general contours of the fraudulent scheme alleged by the government.

United States v. Smith, 13 F.3d 1421 (10th Cir. 1994); App. at ix. (citation omitted). The Tenth Circuit further stated:

> To be entitled to a good faith defense instruction in a mail fraud prosecution, therefore, the defendant's evidence, if believed, must have the capacity to rebut all evidence of false and misleading conduct, all failures to disclose that which should have been disclosed and all matters that deceive and were intended to deceive another. A benign explanation of only some of the acts is insufficient . . . .

App. at xii.

These statements directly and necessarily collide with bedrock principles of constitutional jurisprudence. Implicit in the Fifth and Sixth Amendment's guarantees of due process and a fair trial is the defendant's right to present his defense theory to the jury and to obtain an instruction on any recognized defense if that defense has some support in the evidence, even though that support may be insubstantial. *See, e.g., Whipple v. Duckworth*, 957 F.2d 418, 423 (7th cir. 1992), *cert. denied*, 113 S. Ct. 218 (1992). A defendant cannot be deprived of the right to have the jury instructed on a particular defense on the basis that this defense extends only to some of the acts alleged by the government. Particularly in a complex case,

such as one involving mail fraud, the defendant may deny involvement with certain acts, while admitting to his good faith participation in other acts. Certainly, it is not inconceivable in such a case that a defendant could truthfully deny participation in certain aspects of an alleged scheme. There is simply no basis for an appellate court to single out the defense of good faith and subject it to a requirement that does not apply to any other defense.

The constitutional infirmity of the Tenth Circuit's holding is most graphically illustrated in a case such as Smith's, in which the jury could have convicted the defendant purely on the basis of the acts in which she admitted participation, if it concluded that her participation was with fraudulent intent.

In sum, Smith's defense was two-pronged: (1) that the multiple refunding of tickets, if it occurred, was the work of others at the agency; and (2) that she did nothing more than use her American Express card in good faith to obtain a legitimate credit "float" to improve cash flow and never intended to do anything illegal. Under the instructions given — which correctly informed the jury that the government, to prove mail fraud, need not prove that the scheme caused actual loss — the jury could have set aside the extensive and complex evidence on the airlines' losses and convicted Smith simply on the basis of the acts in which she admitted participation, if it concluded that her participation was with fraudulent intent.

Although Smith's intent was squarely at issue, the Tenth Circuit held that because her good faith beliefs did not pertain to all acts alleged, she was not entitled to a good faith defense instruction. The appeals court further explained its reasoning:

> If the only evidence presented by the government was the use by Smith of her American Express card in the purchase of six foreign conjunctive tickets, she probably would have been entitled to the good faith defense instruction to the mail fraud charges. But the government presented more evidence, much more. The government's evidence showed that Smith's plan, if believed by a jury, included purchase of 12 of the 18 foreign conjunctive tickets with cash from Globemaster's bank account. This use of cash to buy 12 tickets was in no way explained, excused, or mitigated by the use of a credit card to purchase six tickets. Thus, even if the jury would have accepted the Appellant's reasons for the use of the credit card, her evidence would not have negated the accusations of misrepresentation in the obtaining of 12 of the 18 tickets.

App. at xi. In this paragraph, the Tenth Circuit includes a critical phrase — "if believed by the jury" — but neglects its import. The jury, of course, was free to believe the testimony of Government witnesses or to believe Smith's testimony that she was not involved in the cash purchase of 12 of the 18 foreign conjunctive tickets. It is the essence of a jury trial that matters of credibility are left for the jury, and not the court, to decide. *United States v. Pinalto*, 771 F.2d 457, 459 (10th Cir. 1985). Significantly, in *Matthews*, this Court cited an appellate case stating that even when inconsistent testimony by a defendant claiming entrapment seriously impairs or destroys his credibility, the jury should still be instructed as to the inconsistent defense of entrapment if enough evidence supports it. 485 U.S. at 65-66 (citing *United States v. Demma*, 523 F.2d 981, 985 (9th Cir. 1975) (en banc)).

The Tenth Circuit's new rule restricting the availability of the good faith defense not only raises serious constitu-

tional concerns, but also cannot be reconciled with extensive case law. It is widely recognized that a defendant's good faith beliefs may pertain to one count but not another, *see, e.g., United States v. Haddock*, 956 F.2d 1534, 1546 (10th Cir. 1992), on rehearing in part, 961 F.2d 933 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 88 (1992), or that the defendant's claims of entrapment may run to one count but not others, *see, e.g., United States v. Cruz*, 783 F.2d 1470, 1473 (9th Cir. 1986), *cert. denied*, 476 U.S. 1174 (1986). Courts have explicitly approved instructions that permitted the jury to find that the defendant was entrapped as to certain transactions but not as to others. *See Cruz*, 783 F.2d at 1473; *see also United States v. Evans*, 910 F.2d 790, 801 (11th Cir. 1990) (district court justified in refusing to give an entrapment instruction with regard to a tax fraud count although it had given one with regard to an extortion count), *aff'd*, 112 S. Ct. 1881 (1992).

The observation that a particular defense may apply to certain alleged acts but not to others logically should extend to cases in which multiple acts are alleged under the rubric of "fraudulent scheme" and are charged in a single count. In a mail fraud case, individual counts are charged not on the basis of separable fraudulent acts but on the basis of individual mailings made in furtherance of the alleged scheme. *See* 18 U.S.C. § 1341. Just as a defendant may rely on entrapment as to one count but not another, a defendant in a mail fraud case may deny involvement in certain acts that are part of the alleged scheme while also admitting his good faith participation in other acts. Certainly, there is no inconsistency here, logical or otherwise.

As stated above, courts have permitted the defendant to obtain instructions on the inconsistent defense. In *Matthews*, this Court held that a defendant was entitled to an entrapment instruction even though a jury could not logically con-

clude that the defendant had both failed to commit the elements of the offense and been entrapped. 485 U.S. 63-66. This Court observed that federal appellate cases have permitted the raising of inconsistent defenses. *Id.* at 64 (citing *Johnson v. United States*, 426 F.2d 651, 656 (D.C. Cir. 1970); *Womack v. United States*, 336 F.2d 959 (D.C. Cir. 1964)). Although the raising of inconsistent defenses may be a grave strategic error and may seriously impair the defendant's credibility, the validity of the defendant's testimony is a matter for the jury, and not the court, to decide. *See Matthews*, 485 U.S. at 65. "We are simply not persuaded by the government's arguments that we should make the availability of an instruction on entrapment where the evidence justifies it subject to a requirement of consistency to which no other such defense is subject." *Id.* at 66. *See also United States ex. rel. Eaglin v. Welborn*, 815 F. Supp. 1181, 1183-84 (C.D. Ill. 1993).

If a defendant is entitled to an instruction on his entrapment defense even when that defense is inconsistent with his denial of one or more elements of the crime, then certainly Smith, whose version of the facts contained no logical inconsistency, was entitled to an instruction on good faith.

When a trial court refuses to give an instruction on a defense that is supported in the evidence the result is "'trial by the judge, rather than trial by a jury.'" *United States ex. rel. Everette v. Roth*, 808 F. Supp. 1332, 1337 (N.D. Ill. 1992). The refusal dilutes the defendant's jury trial by removing the issue from the jury's consideration, *Whipple*, 957 F.2d at 423, and thus may violate the Fifth and Sixth Amendments. *Id.; Roth*, 808 F. Supp. at 1337.

The Tenth Circuit attempts to reinforce its holding by referring to other acts that Smith committed which it labels as fraudulent. *See* App. at xi - xii. These activities included issuing domestic airline tickets under false names and authoriz-

ing weekly reports to the Airline Reporting Corporation that contained false information regarding customer purchases and refunds. *Id.* In fact, Smith testified extensively that she performed these acts in good faith as she viewed herself as a legitimate customer of the airlines entitled to purchase the tickets that she bought. Again, Smith's testimony concerns her good faith and lack of fraudulent intent.

When the Tenth Circuit cited these acts in support of its conclusion that Smith was not entitled to a good faith defense instruction, it simply begged the ultimate question. It is the jury's role, not the court's, to decide whether the defendant formulated and executed a fraudulent plan. To contend that the defendant does not deserve a good faith instruction because she committed fraud assumes the very fact the jury is there to decide. *See United States v. Opdahl*, 930 F.2d 1530, 1535 (11th Cir. 1991).

The Tenth Circuit also erred in applying the wrong standard by which to view the evidence. In essence, the appellate court appears to have viewed the evidence in the light most favorable to the verdict. However, the law is clear that in determining the defendant's entitlement to a theory-of-defense instruction, the court is to view the evidence in the light most favorable to the defendant. *See, e.g., United States v. Allen*, 798 F.2d 985, 1005 (7th Cir. 1986) (to merit instruction on defense of coercion, defendant "need only meet a minimal showing and [his/her] evidence should be taken as true"). Numerous cases establish that a defendant seeking a theory-of-defense instruction does not face a formidable task. As long as there is "some" or "any" foundation to support a proffered defense instruction that correctly states the law, the District Court must give the instruction. *Opdahl*, 930 F.2d at 1535; *United States v. Cordova-Larios*, 907 F.2d 40, 42 (5th Cir. 1990) (defendant entitled to theory of defense instruction if there is

"any foundation" in the evidence); *United States v. Casperson*, 773 F.2d 216, 223 n.12 (8th Cir. 1985) (defendant entitled to theory-of-defense instruction even if supporting evidence is "weak, inconsistent, or of doubtful credibility"); *Roth*, 808 F. Supp. at 1338. *See also United States v. Hopkins*, 744 F.2d 716, 717-18 (10th Cir. 1984).

The focus of a good faith defense is on the defendant's actual good faith beliefs, not what reasonable persons might have believed, or what such persons might believe with the benefit of hindsight as to the practicality of the scheme or plan. *See Hopkins*, 744 F.2d at 718; *see also Cheek v. United States*, 111 S. Ct. 604, 611 (1991). A review of the record establishes that Smith adduced adequate evidence of her good faith beliefs to support a good faith instruction.

Smith submits that her entitlement to the good faith instruction was clear. She further submits that the Tenth Circuit's conclusion that she did not deserve a good faith defense instruction because her good faith beliefs did not encompass all acts alleged by the government transgresses her constitutional rights and cannot be squared with extensive case law, including this Court's opinion in *Matthews*. A defendant in a fraud case should not be forced to admit to all acts alleged in order to obtain the benefit of a good faith defense instruction.

In sum, Smith submits that this Court should grant her Petition for Writ of Certiorari because of: (1) the exceptional importance of this issue in federal fraud prosecutions; and (2) the fact that the Tenth Circuit's opinion runs afoul of constitutional guarantees and cannot be squared with *Matthews* and other case law.

CONCLUSION

In this Petition for Writ of Certiorari, Petitioner respectfully requests that this Court determine whether a defendant in a complex fraud case can properly be denied a good faith defense instruction on the basis that her stated good faith beliefs do not pertain to *all* acts alleged by the government, even though the defendant denied participation in some acts and stated that she operated on a good faith basis with regard to other acts. By submitting this Petition for Writ of Certiorari, Petitioner respectfully requests that this Court resolve the inherent conflict that exists between the Tenth Circuit's opinion in *United States v. Smith* and this Court's opinion in *Matthews v. United States*. Petitioner also asserts that this issue is an important question of federal law that implicates the Fifth and Sixth Amendments of the Constitution.

WHEREFORE, for the foregoing reasons, Petitioner respectfully requests this Court grant her Petition for Writ of Certiorari as to both decisions of the Tenth Circuit Court of Appeals, case numbers 93-3159 and 93-3307, as described in her Statement of Jurisdiction.

Respectfully submitted,

WYRSCH ATWELL MIRAKIAN LEE
& HOBBS, P.C.

JAMES R. WYRSCH (MO # 20730)
(Counsel of Record)
CHERYL A. PILATE (MO # 42266)
1101 WALNUT, SUITE 1300
KANSAS CITY, MISSOURI 64106
(816) 221-0080 TEL
(816) 221-3280 FAX

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

[FILED: 1/6/94]

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
v.)
BRENDA LU SMITH,)
)
Defendant-Appellant.)

Appeal from the United States District Court
For the District of Kansas
(D.C. No. 92-20011-01)

Julie A. Robinson, Assistant United States Attorney (Randall K. Rathbun, United States Attorney, with her on the brief), Kansas City, Kansas for Appellee.

James R. Wyrsch (Ronald D. Lee, Cheryl A. Pilate, with him on the brief), of Wyrsch, Atwell, Mirakian, Lee & Hobbs, P.C., Kansas City, Missouri, for Appellant.

Before: BALDOCK, ALDISERT*, and BRORBY, Circuit Judges.

ALDISERT, Circuit Judge.

In this appeal by Brenda Lu Smith from her conviction for mail fraud and money laundering, the major question for decision is whether she was entitled to a "good faith" jury instruction as a defense to charges of using the mails to defraud. We hold that she was not.

We must decide also whether the district court erred in including the word "attempt" in the mail fraud jury instruction, in failing to dismiss several counts of the indictment for lack of specificity and in failing to properly apply the Sentencing Guidelines' grouping requirements and prohibition against double counting. We will affirm the judgment of the district court in all respects.

Jurisdiction was proper in the trial court based on 18 U.S.C. § 3231. This court has jurisdiction pursuant to 28 U.S.C. § 1291. The appeal was timely filed under Rule 4(b) of the Federal Rules of Appellate Procedure.

* Ruggero J. Aldisert, United States Circuit Judge for the United States Court of Appeals for the Third Circuit, sitting by designation.

I.

Appellant Smith was indicted for her participation in a scheme to defraud foreign and domestic airlines of thousands of dollars. She was charged with two counts of mail fraud in violation of 18 U.S.C. § 1341, three counts of money laundering in violation of 18 U.S.C. § 1957 and one count of forfeiture pursuant to 26 U.S.C. § 7203. Several other counts were dismissed prior to trial.

The Appellant's arrest and conviction stemmed from her operation of Globemaster Travel, a travel agency in Lenexa, Kansas. Globemaster Travel was originally owned by Smith and later sold to local investors, although she stayed on as manager. Globemaster was a member of the Airline Reporting Corporation, an intermediary organization that assists in the transmission of paperwork and funds between the airlines and travel agencies.

Globemaster was required to mail to Airline Reporting each week a report of its cash and credit sales, credit card refunds, cash refunds, ticket exchanges and earned commissions. From the documentation provided, Airline Reporting would determine the net amounts due Globemaster or owed by it to the various airlines. Thus, the reporting of ticket refunds by a travel agency to Airline Reporting created a credit in favor of the agency tantamount to a bank deposit. Similarly, the reporting of a ticket sale was equivalent to a debit or withdrawal.

Evidence was presented at trial showing that between May 8, 1989 and June 7, 1989, Smith purchased eighteen airline tickets in names other than her own for multiple-leg travel in foreign countries. These tickets consisted of several ticket coupons printed in two or more ticket booklets. These multi-leg tickets are known in the trade as "conjunctive tickets."

Smith and several employees under her direction reported as refunded each coupon of these conjunctive tickets. Globemaster was credited with the entire purchase price each time a coupon from the conjunctive ticket was reported as refunded. As a result, each foreign ticket was refunded multiple times, creating a pool of credits in Globemaster's bank account far exceeding the actual value of the conjunctive tickets originally issued and far exceeding the credit to which Globemaster was entitled. For example, if a conjunctive ticket, issued for a total cost of $3,000, contained five separate ticket coupons, by redeeming each coupon for the total amount of $3,000, Globemaster stood to receive $15,000 as credit refunds for a conjunctive ticket for which it was entitled to only $3,000. This was a classic case of "cooking the books."

In addition, some of the original eighteen conjunctive tickets were exchanged for additional conjunctive tickets, which were then split and either reported as refunded or exchanged for still more multi-leg tickets.

In the second stage of the scheme, the Appellant or her employees drew upon the pool of credits created by the multiple refunding of conjunctive tickets by issuing tickets for travel in the United States on domestic airlines. These domestic tickets were reported as cash sales, and Airline Reporting debited the pool of credits in Globemaster's account to show payment for the domestic tickets. Subsequently, the Appellant, together with some friends and various employees operating under her direction, redeemed these domestic tickets at airline ticket counters located in various airports throughout the United States, receiving cash or refund checks.

The government presented evidence at trial that the Appellant's scheme resulted in a loss of approximately $389,230.22 to the foreign airlines and approximately $184,533.50 to the domestic airlines. Evidence was also pre-

sented that the Appellant used the mails to effectuate her scheme. Each week, she had her employees mail to Airline Reporting's processing center in El Paso, Texas, Globemaster Travel's report which contained the fraudulent tickets, refund notices and exchange notices.

On June 28, 1989, after discovering the fraudulent activity at Globemaster Travel, Airline Reporting dispatched representatives to the travel agency to seize their ticket stock and access plates. On that same day, the Appellant instructed one of her employees, Joann Gustin, to move money out of two of Globemaster's bank accounts. Ms. Gustin withdrew $12,683 from one and $115,494 from the other and deposited funds totalling $128,177 into her own account. On July 3, 1989, Gustin and the Appellant opened a bank account at First National Bank of Overland Park under a new name, LeShoppe Ltd., and deposited the entire $128,177. Within a four month period, the Appellant allegedly used the funds to pay personal debts.

At trial, Smith testified in her own defense. She said that she was unaware of any plan to create an inflated pool of credits in the Globemaster bank account by claiming multiple refunds of foreign airline tickets. She testified that she authorized the purchase of only six foreign airline tickets worth approximately $100,000 on her American Express card and the subsequent refund of those same tickets so that Globemaster could obtain the benefit of a 60-day float through the use of her credit card. She contended that Globemaster was suffering from cash flow problems and that she had developed the American Express card plan in order to reduce Globemaster's weekly liability to Airline Reporting. She testified that she did not intend to steal money, but to use her American Express card to obtain a legitimate credit float

Significantly, the government noted that, at best, Smith's testimony explained only six of the 18 conjunctive tickets which formed the basis of the prosecution. The remaining 12 tickets were purchased with cash from Globemaster's account.

The Appellant was tried before a jury which returned a verdict of guilty on December 3, 1992 on all six counts and a special verdict ordering forfeiture on the remaining count. The court sentenced Smith to 48 months in prison, 3 years supervised release, imposed a special assessment of $250 and imposed a fine of $75,000.

After her trial, Smith unsuccessfully moved for a judgment of acquittal or, in the alternative, for a new trial on several grounds, some of which she has raised again on appeal.

II.

On appeal, Smith contends that the district court committed reversible error by failing to give her requested good faith instruction concerning the mail fraud counts; that it committed plain error by including the word "attempt" in certain instructions dealing with mail fraud and by failing to give a specific unanimity instruction; that it erred by failing to dismiss Counts Two and Three of the indictment for failure to state an offense or, in the alternative, for failure to grant a new trial; and that it erred when it applied the sentencing guidelines by failing to group the mail fraud and money laundering offenses pursuant to U.S.S.G. § 3D1.2 and by double counting.

The appropriate standard of review for challenges to jury instructions is whether the jury, considering the instructions as a whole, was misled. *United States v. Mullins*, 4 F.3d 898, 900 (10th Cir. 1993). Only where the reviewing court has "substantial doubt that the jury was fairly guided" will the

judgment be disturbed. *Id.* We apply a de novo standard of review to determine the propriety of an individual jury instruction to which objection was made at trial. *United States v. Sasser*, 974 F.2d 1544, 1551 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1063 (1993).

Where no objection was made to the giving of a jury instruction or its contents, we review only under the plain error standard. *United States v. Uresti-Hernandez*, 968 F.2d 1042, 1046 (10th Cir. 1992). Plain error, in this context, is error that affects the defendant's right to a fair and impartial trial. *Id.* Similarly, we review a court's failure to instruct a jury for plain error if the defendant fails to raise the contention at trial. *United States v. Brown*, 996 F.2d 1049, 1052 (10th Cir. 1993). In order to constitute plain error, the district court's error must have been both "obvious and substantial." *Id.* at 1053.

We review a district court's order granting or denying a motion to dismiss an indictment for abuse of discretion. *United States v. Strayer*, 846 F.2d 1262, 1265 (10th Cir. 1988).

Under the Federal Sentencing Guidelines, we review the district court's findings of fact under the clearly erroneous standard and disputed legal issues under the de novo standard. *United States v. Levy*, 992 F.2d 1081, 1083 (10th Cir. 1993).

III.

We have concluded that the district court did not err by refusing to give a "good faith" instruction to the jury, because the Appellant did not present sufficient evidence to warrant the instruction. According to the district court:

> [D]efendant's proffered defense is not analogous to a good faith defense. Defendant basically argues that she was merely trying to float a loan though the use of her American Express

> card, and was not involved with the scheme as alleged by the government at all (or that in fact the scheme alleged by the government never existed).

App. of Appellant at 79.

In *United States v. Hopkins*, 744 F.2d 716, 717 (10th Cir. 1984) (en banc), we explained that "good faith" is a defense to charges of using the mails to defraud and that "if the defense of good faith has been interposed the defendant is entitled to an instruction directly on the issue provided there is sufficient evidence to support the theory and such an instruction is requested." *Id.*

Smith contends that her extensive testimony as to her good faith belief that she was not doing anything illegal and that she was simply trying to access credit legitimately available on her American Express card is sufficient evidence to warrant a good faith instruction. We disagree. Implicit in our formulation of the good faith defense to charges of mail fraud is the requirement that for there to be "'sufficient' evidence to support the theory," *Hopkins*, 744 F. 2d at 717, the quantum of evidence must embrace the general contours of the fraudulent scheme alleged by the government. *See Sparrow v. United States*, 402 F.2d 826, 828 (10th Cir. 1968).

A.

Our analysis must begin with a reference to the various components of the offense of fraud. Although fraud covers a proverbial multitude of sins, it is generically defined as:

> [a]n intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to [the other] or to surrender a legal right. A false representation of a matter of fact, whether by

> words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he [or she] shall act upon it to his [or her] legal injury. . . . "Bad faith" and "fraud" are synonymous . . . .

Black's Law Dictionary (5th ed. 1979).

Intent is a necessary ingredient in proving the charge of fraud. Whether as generally construed or as specifically applied in the case before us, the "perversion of the truth" component has been equated with intentional misrepresentation, at least since 1889 when the House of Lords in the leading case of *Derry v. Peek*, 14 A.C. 337 (1889), redefined the tort of deceit and required this specific intent:

> The intent which underlies an intentional misrepresentation is a more complex matter than the relatively simple intention in the case of assault and battery. It involves the intent that a representation shall be made, that it shall be directed to a particular person or class of persons, that it shall convey a certain meaning, that it shall be believed, [] that it should be acted upon in a certain way . . . [and that it] accomplish an ultimate purpose, as to benefit the [actor] . . . .

W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, *Prosser and Keeton on the Law of Torts*, § 107 (5th ed. 1984).

The good faith defense seeks to demonstrate that there was no such intent: no misrepresentation, no intentional perversion of the truth. Accordingly, the essence of the defense is that the evidence presented by the defendant, if believed by the fact finder, would completely rebut evidence that he or she intended to defraud.

The cumulative experience of the judiciary discloses that the defendant charged with mail fraud is entitled to the defense and the concomitant jury instruction only when her evidence, if believed, demonstrates that she in good faith actually believed (1) that the plan, howsoever visionary and impractical, would succeed, (2) that promises made would be kept and (3) that representations made would be fulfilled. *Hopkins*, 744 F.2d at 718; *United States v. Roylance*, 690 F.2d 164, 168 (10th Cir. 1982); *Steiger v. United States*, 373 F.2d 133, 135 (10th Cir. 1967). The good faith defense was intended as a *complete* defense to a charge of using the mails to defraud. *Sparrow*, 402 F.2d at 828.

If the only evidence presented by the government was the use by Smith of her American Express card in the purchase of six foreign conjunctive tickets, she probably would have been entitled to the good faith defense instruction to the mail fraud charges. But, the government presented more evidence, much more. The government's evidence showed that Smith's plan, if believed by the jury, included purchase of 12 of the 18 foreign conjunctive tickets with cash from Globemaster's bank account. This use of cash to buy 12 tickets was in no way explained, excused or mitigated by the use of a credit card to purchase six tickets. Thus, even if the jury would have accepted the Appellant's reasons for the use of the credit card, her evidence would not have negated the accusations of misrepresentation in obtaining 12 of the 18 tickets.

Moreover, the uncontroverted evidence disclosed that the Appellant not only used false names for the foreign tickets purchased with her American Express card, but after Airline Reporting credited her with the refunds of these tickets, she also issued domestic tickets under false names and had those tickets refunded. Subsequently, she authorized weekly reports containing false information regarding customer pur-

chases and refunds. These activities in themselves were fraudulent. *See, United States v. White*, 673 F.2d 299, 304-05 (10th Cir. 1982) ("even if a defendant charged with fraud believed the business plan would ultimately succeed, that belief would not justify false or baseless representations").

To be entitled to the good faith defense instruction in a mail fraud prosecution, therefore, the defendant's evidence, if believed, must have the capacity to rebut all evidence of false and misleading conduct, all failures to disclose that which should have been disclosed and all matters that deceive and were intended to deceive another. A benign explanation of only some of the acts is insufficient and that is all that Brenda Lu Smith presented. Accordingly, we conclude that the district court did not err in refusing the instruction.

IV.

The Appellant next contends that the district court committed plain error by including the word "attempt" in the three instructions pertaining to mail fraud, because no scheme involving attempt was charged in the indictment. No objection to the instructions were made at trial. The Appellant presented this contention before the district court for the first time in her motion for a new trial. In rejecting the argument, the court noted:

> The language in Instructions 8 and 9 does not allow a jury to convict on the grounds that the defendant "attempted" to commit mail fraud. Rather, the instructions state that the government must prove that the defendant knowingly devised a scheme to obtain "or attempt to obtain" money or property. This language is in keeping with the well settled law that actual loss is not an element of mail fraud. *See United States v. Aigbevbolle*, 827 F.2d 664, 666 (10th Cir. 1987).

App. of Appellant at 76.

We agree. The federal mail fraud statute reads in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . , for the purpose of executing such scheme or artifice *or attempting so to do,* places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . .

18 U.S.C. § 1341 (emphasis added).

The instructions are not at variance with the indictment. The indictment does not state that Smith obtained or attempted to obtain money, but that her purpose was to obtain money. Having such a purpose is consistent with devising a scheme to obtain or to attempt to obtain money. The district court's instructions tracked the language of the statute. Accordingly, we determine that the court committed no error.

In a related argument, the Appellant contends that the general jury instructions requiring that the jury return a unanimous verdict were insufficient in this case. She admits that general unanimity instructions "such as those given by the district court" often suffice, but she suggests that in a case involving mail fraud, the jurors should be instructed that they must all agree on the existence of, and defendant's participation in, the same scheme to defraud. Brief of Appellant at 33. Not only has the Appellant not made a specific showing of prejudice, she cites no authority for her position, except an article in a professional publication written by her appellate

counsel.[1] There was no request for such an instruction at trial. Considering that the district court did provide a general unanimity instruction, we are persuaded that the court's failure to have read *sua sponte* Appellant counsel's interesting article and not to have accepted its observations was not an obvious and substantial omission and thus did not constitute plain error.

V.

The Appellant contends also that Counts Two and Three of the indictment lacked the specificity necessary to allege a "scheme or artifice to defraud" and "obtain money or property by false pretenses." Her argument is anchored in the proposition that the factual averments of these counts had been contained in Count One, a count that was later dismissed. The mail fraud counts incorporated by reference the factual averments found in Count One. From this the Appellant argues that the counts on which she was convicted were infirm because they lacked the necessary factual specificity.

The Supreme Court put this argument to rest almost a century ago. In *Crain v. United States*, 162 U.S. 625, 633 (1896), *overruled on other grounds by Garland v. Washington*, 232 U.S. 642 (1914), the Court held:

> One count may refer to matter in a previous count so as to avoid unnecessary repetition; and, if the previous count be defective or is rejected, that circumstance will not vitiate the remaining counts, if the reference be sufficiently full to incorporate the matter going before with that in the count in which the reference is made.

[1] James R. Wyrsch & Jacqueline Cook, *Jury Unanimity: A Requirement of Due Process*, The Champion 18 (June 1992) (Suggesting the use of special interrogatories to find elements of the charged offense and noting that specific "issues regarding jury unanimity may be addressed through jury instructions").

The Appellant attempts to distinguish Crain on the ground that the trial court in that case did not dismiss certain counts in the indictment until after the trial, whereas here Count One was dismissed prior to trial. At least one Court of Appeals has found this to be a distinction without a difference. *United States v. Weiner*, 578 F.2d 757, 776 (9th Cir.) (dismissal of one count of an indictment prior to trial which is referred to in the remaining counts does not vitiate the remaining counts where the reference is sufficient), *cert. denied*, 439 U.S. 981 (1978). We agree.

We are satisfied that the government has met the two-part test to review the sufficiency of an indictment:

> "First, the indictment must contain the elements of the offense and sufficiently apprise the defendant of what he must be prepared to meet; second, it must be such as to show to what extent he may plead a former acquittal or conviction as a bar to further prosecution for the same cause."

United States v. Darrell, 828 F.2d 644, 647 (10th Cir. 1987) (quoting *United States v. Radetsky*, 535 F.2d 556, 562 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976)). This test is based upon the provisions of Rule 7(c)(1) of the Federal Rules of Civil Procedure, which provides that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Rule 7(c)(1) also states that "[a]llegations made in one count may be incorporated by reference in another count."

VI.

Finally, the Appellant contends that the district court committed two errors in computing her sentence: in failing to group the mail fraud and money laundering offenses pursuant to U.S.S.G. Section 3D1.2 and in improperly enhancing,

by impermissible double counting, Smith's offense level under both Section 2F1.1(b)(2) and Section 3B1.1(a).[2] We are not persuaded by either argument.

A.

Section 3D1.2 provides in pertinent part:

> All counts involving substantially the same harm shall be grouped together into a single Group. . . . Counts involve substantially the same harm within the meaning of this rule:
>
> . . .
>
> (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

The Appellant argues that the mail fraud and money laundering offenses should be grouped together under subsection (c) because the mail fraud count was used as a "specific offense characteristic" in the application of the guideline section applicable to money laundering, Section 2S1.2(b)(1)(B). The application notes to subsection (c) provide that "when conduct that represents a separate count, *e.g.*, bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor." Section 2S1.2 entitled "Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity" provides for a two level enhancement if the "defendant knew that the funds were the proceeds of: (B) any other specified unlawful activity."

[2] The district court applied the 1988 Sentencing Guidelines in their entirety to the instant sentencing. App. of Appellant at 208.

The Appellant contends that because the money laundering offense level was adjusted based on her mail fraud, the two offenses must be grouped together, and she analogizes to *United States v. Riviere*, 924 F.2d 1289, 1306 (3d Cir. 1991). In *Riviere*, the court held that the district court should have grouped the three firearm offenses of which the defendant was convicted under Section 3D1.2. Riviere was convicted of possession of firearms by a felon, delivery of firearms to a common carrier and possession of altered firearms. The court reasoned that the guidelines had already provided for an enhanced penalty for possession of a firearm by a felon if that firearm was altered and to enhance further for possession of an altered firearm would violate Section 3D1.2.

We believe that Riviere is not applicable to the present case and that the district court properly followed the teachings of *United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992), where we concluded that money laundering counts should not be grouped with wire fraud counts because there are different victims and separate and distinct losses. The Appellant attempts to distinguish *Johnson* on the grounds that the court did not address subsection (c) or the provisions of Section 2S1.2.

We are not impressed by this argument but for the sake of completeness we now observe that Section 2S1.2 refers to the knowledge of the perpetrator; it does not relate to the commission of a crime. It would seem that application of the enhancement would be possible even if the Appellant herself had not actually committed the mail fraud, but instead had mere knowledge of the money's origins. The critical characteristic of the money laundering offense was not the commission of mail fraud, but Smith's knowledge of it.

The district court did not err in declining to group the money laundering and mail fraud offenses under the Sentencing Guidelines.

B.

Finally, the Appellant contends that the district court erred by enhancing her offense level under both Section 2F1.1(b)(2) and Section 3B1.1(a) of the Sentencing Guidelines. She says that relying on the same acts to support two separate guideline enhancements constitutes double counting.

Section 2F1.1(b)(2), the sentencing guideline for crimes involving fraud or deceit, provides for a two level enhancement if the offense involves "more than minimal planning." Section 3B1.1(a) provides a four level enhancement "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." The district court concluded that application of both of these guideline enhancements was not double counting because the "'more than minimal planning' guideline focuses on the nature of the offense, while the role in the offense guideline focuses on the size of the organization and the defendant's relative culpability compared to others involved." App. of Appellant at 209.

We do not write on a clean slate here. In *United States v. Chichy*, 1 F.3d 1501, 1506 (6th Cir. 1993), the court held that a two-level enhancement for doing more than minimal planning and being organizer, leader, manager or supervisor constituted impermissible double counting. The court reasoned that once certain conduct is used to enhance a defendant's sentence under one enhancement provision, the defendant should not be penalized for the same conduct under a separate provision. *Id.* Although *Chichy* supports the Appellant's position, this holding is the minority, if not isolated, view of the many Courts of Appeals that have also addressed this issue. We are not persuaded to follow it.

Contrary to the holding of the Sixth Circuit Court of Appeals, in *United States v. Wong*, 3 F.3d 667, 671 (3d Cir. 1993),

the court decided that the sentencing guideline enhancements for more than minimal planning and for acting as organizer, leader, manager or supervisor could be applied in tandem without constituting impermissible double counting. The court reasoned that by doing so they were effectuating the intent of the Sentencing commission in enacting these two guideline provisions. *Id.* On the one hand, the adjustment for more than minimal planning is "a specific offense characteristic which was intended to distinguish between relatively simple crimes and more sophisticated ones." *Id.* On the other hand, the adjustment for role in the offense "addresses concerns about the relative responsibilities of those involved in the commission of the offense, punishing those more harshly who assume a leadership role." *Id.* at 672. We believe that the reasoning of the Third Circuit Court of Appeals is sound and so do the other courts of Appeals who have addressed this issue. *See United States v. Balogun*, 989 F.2d 20, 24 (1st Cir. 1993); *United States v. Willis*, 997 F.2d 407, 418 (8th Cir. 1993); *United States v. Kelly*, 993 F.2d 702, 705 (9th Cir. 1993); *United States v. Boula*, 932 F.2d 651, 655 (7th Cir. 1991). Accordingly, in the view we accept, the district court did not engage in impermissible double counting.

VII.

We have considered all contentions presented by the Appellant. To the extent not discussed herein, any other arguments must be deemed considered and rejected.

We AFFIRM the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff - Appellee,	)	
	)	No. 93-3159
v.	)	(D. C. No. 92-20011-01)
	)	
BRENDA LU SMITH,	)	
	)	
Defendant - Appellant.	)	

JUDGMENT
Entered January 6, 1994

Before BALDOCK, ALDISERT*, and BRORBY, Circuit Judges.

---

*The Honorable Ruggero J. Aldisert, United States Circuit Judge for the United States Court of Appeals for the Third Circuit, sitting by designation.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court
ROBERT L. HOECKER, Clerk

By: /s/ PATRICK FISHER
Patrick Fisher
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
C404 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294
(303) 844-3157

ROBERT L. HOECKER
CLERK

PATRICK FISHER
CHIEF DEPUTY

June 7, 1994

Mr. Ralph L. DeLoach
United States District Court for the District of Kansas
122 U.S. Courthouse
812 N. Seventh Street
Kansas City, KS 66101

Re: 93-3159, USA v. Smith
Lower docket: 92-20011-01

Dear Clerk:

In accordance with Fed. R. App. P. 41, I enclose a certified copy of the judgment and a copy of the court's opinion, which constitute the mandate in the subject case. By direction of the court, the mandate shall be filed immediately in the records of the trial court or agency.

The clerk will please acknowledge receipt of this mandate by file stamping and returning the enclosed copy of this letter. Any original record will be forwarded to you at a later date.

Please call this office if you have questions.

Sincerely,
ROBERT L. HOECKER
Clerk
By: /s/
Deputy Clerk

RLH:kc

cc: Cheryl A. Pilate
Ronald D. Lee
James R. Wyrsch
Julie A. Robinson

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[FILED: 2/22/94]

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 93-3307
	)	(D.C. No. 92-20011-01)
v.	)	(D. Kansas)
	)	
BRENDA LU SMITH,	)	
Defendant-Appellant.	)	

ORDER AND JUDGMENT

Before BALDOCK, ALDISERT*, and BRORBY, Circuit Judges.

Brenda Lu Smith appeals the district court's special verdict ordering forfeiture following her conviction for two counts of mail fraud in violation of 18 U.S.C. § 1341 and three counts of money laundering in violation of 18 U.S.C. § 1957. The Appellant raised this issue on appeal in order to preserve her position that, should we reverse the underlying criminal conviction, we must necessarily reverse the forfeiture order. Accordingly, because we affirmed her conviction in *United States v. Smith*, No. 93-3159 (10th Cir. filed January 6, 1994), we will also affirm the order of forfeiture.

*Ruggero J. Aldisert, United States Circuit Judge for the United States Court of Appeals for the Third Circuit, sitting by designation.

Entered for the Court

/s/ RUGGERO J. ALDISERT

Ruggero J. Aldisert
Senior Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.

BRENDA LU SMITH,
Defendant - Appellant.

No. 93-3159

ORDER
Entered May 13, 1994

Before BALDOCK, ALDISERT*, and BRORBY, Circuit Judges.

---

*The Honorable Ruggero J. Aldisert, United States Circuit Judge for the United States Court of Appeals for the Third Circuit, sitting by designation.

This matter comes on for consideration of appellant's motion for extension of time to file a petition for rehearing and appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the motion for extension of time is granted and the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court

be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
ROBERT L. HOECKER, Clerk
By: /s/

Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
	)	Nos. 93-3159
v.	)	93-3307
BRENDA LU SMITH,	)	
Defendant-Appellant.	)	

ORDER
Filed: **September 29, 1993**

This matter comes on for consideration on the court's own motion.

Upon consideration thereof it is ordered that the captioned appeals are consolidated for procedural purposes only.

It is further ordered that the appellant's opening brief in 93-3307 shall be served and filed within 20 days of the date of this order. The appellee shall file its answer brief within 20 days of the date of service of the appellant's opening brief. The appellant may serve and file a reply brief by November 8, 1993. If the appellant files a reply brief, the brief must received by the clerk's office of this court by November 8 and received by the appellee by November 9.

Appeal No. 93-3307 shall be submitted on the briefs to the same panel scheduled to hear oral argument on November 12, 1993 of appeal No. 93-3159.

Entered for the Court
/s/ ROBERT L. HOECKER
ROBERT L. HOECKER, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

[FILED: 4/28/93]

UNITED STATES OF AMERICA,)
Plaintiff,)
v.) Case No. 92-20011-01
)
BRENDA LU SMITH,)
Defendant.)

MEMORANDUM AND ORDER

This matter is before the court on the post-trial motions of defendant Brenda Lu Smith for judgment of acquittal or, in the alternative, for a new trial (Doc. #218)[1]; for reconsideration of order of forfeiture (Doc. #222)[2]; and alternative motion for extension of time to file notice of appeal (Doc. #223)[3]. For the reasons set forth below, defendant's motion for acquittal is granted as to Count 8 due to insufficiency of the evidence and it and her new trial motions are denied on all other grounds.

[1] Defendant was represented by counsel Cenobio Lozano from the inception of this case through the trial and filing of the motion for judgment of acquittal. Mr. Lozano has subsequently withdrawn as defendant's counsel and James Wyrsch has been retained by defendant. Mr. Wyrsch has filed a supplemental memorandum in support of motion for acquittal (Doc. # 247) and a second supplemental memorandum in support of motion for judgment of acquittal (Doc. # 260). The court has considered the arguments' contained in the supplemental memorandums in this order.

[2] The court has reviewed the arguments contained in defendant's motion for reconsideration of order of forfeiture and found them to be without merit. Accordingly, this motion shall be denied.

[3] The court has determined this motion to be moot.

On April 22, 1992, the defendant was indicted by the grand jury. Count 1 of the indictment charged the defendant, along with four other co-defendants, with a conspiracy to use unauthorized access devices obtained with intent to defraud in violation of 18 U.S.C. § 1029(a)(2). Counts 2 and 3 of the indictment charged the defendant with mail fraud in violation of 18 U.S.C. § 1341. Counts 4, 5 and 6 charged the defendant with money laundering in violation of 18 U.S.C. §§ 1957 and 2. Count 7 was a forfeiture count brought against the defendant pursuant to 18 U.S.C. § 982(b)(1). Count 8 charged the defendant with willful failure to file a corporate income tax return in violation of 26 U.S.C. § 7203. Count 9 charged three other defendants with a criminal conspiracy to obstruct the collection of income tax.

Prior to trial the defendant, along with the other defendants charged in the conspiracy set forth in Count 1 of the indictment, moved for dismissal of that count. The court found that the facts as presented in Count 1 of the indictment did not affect a credit transaction as contemplated by 18 U.S.C. § 1029, and therefore the court dismissed Count 1 as to the various defendants. Subsequently, the government voluntarily dismissed the conspiracy charge contained in Count 9 of the indictment.

The case was tried on the remaining counts to a jury, which on December 3, 1992 returned a verdict of guilty on Counts 2 through 6 and 8 and a special verdict ordering forfeiture under Count 7. Defendant has moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c) or, in the alternative, for a new trial pursuant to Rule 33. Defendant has also brought motions to reconsider the order of forfeiture and to extend the time to file notice of appeal. The government has responded to the defendant's motions. The parties orally argued the motions to the court at a hearing on April 19, 1993, and the court is now prepared to rule.

I. Motion for Judgment of Acquittal or, in the Alternative, for a New Trial

A. Sufficiency of the evidence

The defendant seeks a judgment of acquittal or, in the alternative, a new trial because of insufficient evidence. "A verdict in a criminal case is sustained only when there is 'relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt,' that the accused is guilty." *American Tobacco Co. v. United States*, 328 U.S. 781, 787 n.4 (1946)(*citing Mortensen v. United States*, 322 U.S. 369, 374 (1944)). "[T]he issue is whether, taken in the light most favorable to the government, there is substantial evidence from which a reasonable jury might properly find the defendant guilty beyond a reasonable doubt." *United States v. Johnson*, 911 F.2d 1394, 1399 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 761 (1991). The government is entitled to the benefit of all reasonable inferences consistent with the evidence at trial. *United States v. Dickey*, 736 F.2d 571, 583 (10th Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985). "The court should enter a judgment of acquittal only if the evidence that the defendant committed the crime is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *United States v. White*, 673 F.2d 299, 301 (10th Cir. 1982).

1. Counts 2 and 3

Counts 2 and 3 charged the defendant with mail fraud in violation of 18 U.S.C. § 1341. The essential elements of a mail fraud violation are: (1) the act of having devised or devising a scheme or artifice to defraud or attempt to defraud, and (2) use of the mails willfully to carry out an essential step of the scheme to defraud. *United States v. Aigbevbolle*, 827 F.2d 664, 666 (10th Cir. 1987), *citing United States v. Curtis*, 537 F.2d 1091, 1095 (10th Cir.), *cert. denied*, 429 U.S. 962 (1976).

The government presented voluminous evidence at trial regarding defendant's scheme to defraud the airlines. Evidence was presented that between May 8, 1989 and June 7, 1989, defendant purchased eighteen foreign airline tickets. These were conjunctive tickets, which resulted in the tickets being printed on several different coupons. Further evidence showed that defendant and employees under defendant's direction reported refunds to the Airline Reporting Commission ("ARC") for each coupon of these conjunctive tickets. This resulted in each foreign ticket being refunded multiple times, each time refunded for the total ticket price, creating a pool of credits in the Globemaster Travel bank account. Further evidence was presented that some of the original eighteen tickets were exchanged for still more conjunctive tickets, which were then split and either reported as refunded or exchanged for still more conjunctive tickets.

The government then presented evidence that in the second stage of her scheme defendant or employees under her direction accessed the pool of credits created by the multiple refunding of conjunctive tickets by issuing tickets for travel in the United States on domestic airlines. These domestic tickets were reported to the ARC as cash sales, which meant the ARC would debit the pool of credits created during the foreign ticket phase to pay for the domestic tickets. The government then presented evidence that defendant, various employees under defendant's direction and friends of defendant cashed these domestic tickets at airline ticket counters located in various airports throughout the United States, receiving cash or refund checks. Further evidence was presented by the government that when the ARC discovered the defendant's fraudulent activity, they reversed the reports of Globemaster Travel for the weeks of June 18, 1989 and June 25, 1989. The evidence presented by the government showed that defendant's scheme resulted in a loss of approximately

$389,230.22 to the foreign airlines and approximately $184,533.50 to the domestic airlines.

The government presented further evidence at trial that defendant utilized the United States mails in effectuating her scheme. Evidence was presented that each week defendant caused her employees to mail to the ARC processing center in El Paso, Texas, the weekly report of Globemaster Travel which contained the fraudulent tickets, refund notices and exchange notices. Defendant was convicted of two counts of mail fraud for the May 14 weekly report, mailed on May 16, and the June 11 report, mailed on June 13.

The court finds that the government presented substantial relevant evidence from which the jury could find or infer, beyond a reasonable doubt, that defendant was guilty of the mail fraud charges contained in Counts 2 and 3 of the indictment.

2. Counts 4, 5 and 6

Counts 4, 5 and 6 charged the defendant with aiding and abetting money laundering in violation of 18 U.S.C. §§ 1957 and 2. The elements of a § 1957 violation are that: (1) the defendant engage or attempt to engage; (2) in a monetary transaction; (3) in criminally derived property that is of a value greater than $10,000; (4) knowing that the property is derived from unlawful activity; and (5) the property is, in fact, derived from "specified unlawful activity." *United States v. Johnson*, 971 F.2d 562, 567 n. 3 (10th Cir. 1992).

The government presented evidence at trial that the ARC sent representatives to Globemaster Travel on June 28 to seize Globemaster's ticket stock and access plates. Evidence was presented that on that same day Joann Gustin was instructed by defendant to move money out of two Globemaster bank accounts, one at Mercantile Bank and one at Valley View

State Bank. Ms. Gustin, at the direction of defendant, withdrew $12,683 from the Mercantile account and $115,494 from the Valley View account.[4] Evidence was presented that Ms. Gustin took the funds from these accounts in the total amount of $128,177 and put them in her own account, at First National Bank of Shawnee Mission, for several days. Further evidence was presented that on July 3, 1989 Gustin and defendant opened a bank account at First National Bank of Overland Park under a new name, LeShoppe Ltd., and deposited the $128,177. Thereafter, within a four month period, defendant spent the funds.

The court finds that the government presented substantial relevant evidence from which the jury could find or infer, beyond a reasonable doubt, that defendant was guilty of the money laundering charges contained in Counts 4, 5 and 6 of the indictment.

3. Count 7

The jury returned a special verdict forfeiting the $128,177 in the money laundering counts. The defendant objects that there was insufficient evidence that she had retained the proceeds. The court finds that there was substantial evidence, in the form of bank records, American Express records and the testimony of witnesses, from which the jury could find that defendant used the $128,177 to pay personal debts.

4. Count 8

Count 8 charged the defendant with wilful failure to file a corporate income tax return in violation of 26 U.S.C. § 7203. The essential elements of a § 7203 violation are: (1) that

[4] The government presented evidence that during the course of the mail fraud scheme, defendant had deposited substantial funds into these two bank accounts by way of ticket refund checks.

the defendant was a person required by law or regulation to file a corporate return; (2) that the defendant failed to file such return at the time required by law; and (3) that the defendant's failure to file such return was wilful. See *United States v. Dawes*, 874 F.2d 746, 749 (10th Cir. 1989).

Defendant argues that there was insufficient evidence at trial to show that defendant was a "person" required by law or regulation to file Globemaster's corporate income tax return. The term "person" is defined in the Internal Revenue Code as including "an officer or employee of a corporation . . . who as such officer or employee . . . is under a duty to perform the act in respect of which the violation occurs." 26 U.S.C. § 7343.

The government contends that three separate areas of evidence were sufficient to establish that defendant had a duty to file the corporate tax return for Globemaster. These are: (1) that defendant, by filing an application for extension of time to file a corporate income tax return for GMT Tours, Inc., acknowledged her duty to file a corporate income tax return on its behalf; (2) that several Globemaster employees testified at trial that defendant was a signatory on the corporate bank accounts and had full control of the financial affairs of the business; and (3) that Abe Gustin, the owner of Globemaster, testified that he was not involved in the day to day operations of Globemaster.

The court finds that the evidence was insufficient to support the jury's verdict on Count 8. The government presented no historical evidence that defendant had prepared the corporate tax returns in the past or that she had been responsible for their preparation. *See United States v. Ettorre*, 387 F.Supp. 582 (E.D. Pa. 1975); *United States v. Jasper*, 352 F. Supp. 254 (D.Del. 1972). There was no job description evidence presented, nor did defendant ever admit that she was the one

responsible for filing the tax returns. *Id.* The court does not find the testimony of the former employees that defendant was in charge of the financial affairs to be helpful to the government on this issue. That general responsibility, if she possessed it, is not enough to give rise to an inference of the very particular duty at issue here. Morever, several of these same employees testified that they believed defendant was the owner of Globemaster, which was not the case. Their lack of knowledge regarding whether defendant was the owner of Globemaster further diminishes the reasonableness of any inference of duty to file tax returns on her part. The government's strongest evidence regarding whether defendant had a duty to file the corporate tax return is the fact that defendant filed the application for extension for the return. However, the government presented no factual background as to the preparation of that application. The court finds that the mere fact defendant's signature appears on the application for extension is not sufficient to establish that defendant had a duty to file the return absent some sort of historical evidence she was responsible for the return or a more fully developed evidentiary record that defendant had indeed taken it upon herself to manage all the business and financial affairs of Globemaster.

The court finds that even looking at the evidence in the light most favorable to the government, the evidence was insufficient to support the jury's verdict as to Count 8. Thus, the defendant's motion for acquittal is granted as to Count 8.[5]

[5] Defendant has made several other arguments throughout her motion for judgment of acquittal attacking various aspects of Count 8. Because we find that the defendant is entitled to a judgment of acquittal based on the insufficiency of evidence, we need not reach these other issues.

B. Effect of Dismissal of Count 1

Count 1 of the indictment alleged a conspiracy by defendant, along with four other co-defendants, to use unauthorized access devices obtained with intent to defraud in violation of 18 U.S.C. § 1029(a)(2). Prior to trial the defendant, along with the other defendants charged in the conspiracy charged in Count 1 of the indictment, moved for dismissal of that count. The court found that the facts as presented in Count 1 of the indictment did not affect a credit transaction as contemplated by 18 U.S.C. § 1029, and therefore the court dismissed Count 1, without prejudice, as to the various defendants.

The first paragraph of Count 1 charged the defendant with a violation of 18 U.S.C. § 1029(a)(2). That paragraph was followed by sections, labeled A, B, C and D, which set forth the factual averments of the government regarding the conspiracy. Counts 2 and 3 of the indictment, the mail fraud counts, incorporated the factual averments of sections A, B, C and D of Count 1 by reference for the purpose of setting forth the alleged scheme and artifice to defraud and the obtaining of money or property by false pretenses of the mail fraud counts. Defendant argues that due to the dismissal of Count 1 of the indictment, the factual averments contained in Count 1 in effect disappeared, rendering Counts 2 and 3 invalid for failure to state an offense.

An indictment must state the elements of the offense charged with enough particularity that the defendant receives fair notice of the charge and would be able to assert an acquittal or conviction in order to prevent being placed in jeopardy twice for the same offense. *United States v. Staggs*, 881 F.2d 1527, 1530 (10th Cir. 1989). It is well settled that material from one count can be used in determining the sufficiency of another count if the material in the first count is expressly in-

corporated into the other count. *See United States v. Hooker*, 841 F.2d 1225, 1231 (4th Cir. 1988). The Tenth Circuit takes an even broader approach to determining the sufficiency of individual counts. It permits "the entire document [to be] considered" in determining the sufficiency of a particular count in the indictment. *United States v. Staggs*, 881 F.2d at 1531-32. There is no question that Counts 2 and 3, with the factual averments properly incorporated from Count 1, gave defendant fair notice of the mail fraud charges against her.[6]

Defendant's sole argument is that the court's dismissal of Count 1 somehow had a "magic scissors" effect, causing the factual averments in Count 1 to disappear. Defendant cites no authority for this proposition. The court does not believe that the dismissal of Count 1 without prejudice somehow made the factual averments in Count 1 no longer available for incorporation by reference into Counts 2 and 3.

In its order dismissing Count 1 without prejudice, the court did not find that any of the facts as stated in Count 1 of the indictment were improperly included in the indictment, or that any of the factual averments should be stricken from the indictment. The court merely held that the facts as presented in Count 1 did not affect a credit transaction as contemplated by 18 U.S.C. § 1029, and thus the conspiracy charge of using unauthorized access devices with the intent to defraud in a credit transaction was dismissed without prejudice as to the various defendants. It simply does not logically fol-

[6] In fact, defendant conceded at oral argument that Counts 2 and 3, with the incorporated language from Count 1, were sufficient to give her notice of the crimes charged, did not prejudice her in any way, and that she did not have any type of double jeopardy argument with the indictment as written with the incorporated language.

low,[7] nor does defendant point to any authority in support,[8] that the result of such a dismissal should be that the factual averments in Count 1 are no longer available for incorporation by reference in Counts 2 and 3.

The court finds that the factual averments in Count 1 were properly incorporated into Counts 2 and 3 notwithstanding the fact that the court dismissed the conspiracy charge contained in Count 1 without prejudice. Defendant was put on fair notice of the mail fraud charges contained in Counts 2 and 3 of the indictment, has no double jeopardy argument, and was not prejudiced in any manner.

C. Jury Instructions

Defendant argues that numerous jury instructions were given in error. Jury instructions are to be reviewed in their entirety to determine whether, when examined in the light of the whole record, they fairly, adequately, and correctly state the governing law to provide the jury with "an ample

[7] When questioned at oral argument, counsel for defendant stated his belief that the government could have corrected his perceived flaw in the indictment simply by retyping the factual averments originally contained in Count 1 of the indictment into Count 2. Given the fact that the factual averments were originally properly incorporated in Counts 2 and 3, defendant had fair notice of the mail fraud charges against her, and defendant was not prejudiced in any manner, the court sees no logical reason why Counts 2 and 3 of the indictment should be dismissed on these grounds.

[8] The only authority the court has found on point is directly contrary to defendant's position. In *Crain v. United States*, 162 U.S. 625 (1986), the Supreme Court held that one count may, to avoid repetition, refer to matter in a previous count and, if the reference is sufficient to incorporate such matter into the count, the count will not be vitiated, even where the previous count is held defective or is rejected. Defendant argues that the *Crain* case is distinguishable because in *Crain* the dismissal of the count took place after trial, whereas the count was dismissed prior to trial in this case. While defendant is correct that this is a factual distinction between *Crain* and this case, distinguishing *Crain* in such a manner does nothing to support defendant's argument.

understanding of the applicable principles of law and factual issues confronting them." *United States v. Denny*, 939 F.2d 1449, 14545 (10th Cir. 1991). An error in jury instructions will cause a new trial only when the error is "prejudicial in light of the entire record." *Id.*

Defendant contends that Instruction No. 2, which contained a recitation of nearly the entirety of the indictment, was prejudicial. Defendant contends this instruction constituted "free advertising" for the government and that this "extra reinforcement" of the government's position prejudiced the defendant. The court disagrees. The court believes that far from being prejudicial to the defendant, the reading of the indictment in fact protects the defendant by allowing the jury to know precisely what the defendant is on trial for allegedly doing.[9] Additionally, the court gave a cautionary instruction that the indictment is merely the government's formal accusation, is not evidence of any kind against a defendant, and does not create any presumption or permit any inference of guilt.

Defendant contends that Instruction No. 6, dealing with the presumption of innocence, was not sufficient and the court should have given her proposed instruction. A defendant is not entitled to a new trial simply because the particular wording preferred by him or her was not employed. *See United States v. DeSoto*, 950 F.2d 626, 631 (10th Cir. 1991); *United States v. Irwin*, 654 F.2d 671, 677 (10th Cir. 1981), *cert. denied* 455 U.S. 1016 (1982). Instruction No. 6, especially when read in conjunction with Instruction No. 4, which advises the jury that the defendant's plea of not guilty creates a burden on the government to prove every material ingredient of the crime beyond a reasonable doubt, was sufficient to apprise the jury of the presumption of innocence standard.

[9] The court did strike argumentative language from the indictment (including the words "bogus" and "cover their tracks").

Defendant next argues that the inclusion of the language "attempt to obtain" in the elements of mail fraud in Instructions No. 8 and 9 was in error.[10] Defendant argues that the language impermissibly broadened the indictment by allowing the jury to convict defendant for "attempting" to devise a scheme or artifice to defraud and created a jury unanimity problem.

The language in Instructions 8 and 9 does not allow a jury to convict on the grounds that the defendant "attempted" to commit mail fraud. Rather, the instructions state that the government must prove that the defendant knowingly devised a scheme to obtain "or attempt to obtain" money or property. This language is in keeping with the well settled law that actual loss is not an element of mail fraud. *See United States v. Aigbevbolle*, 827 F.2d 664, 666 (10th Cir. 1987). The defendant need not have actually obtained money or property in order to be convicted. The instruction correctly states this element of 18 U.S.C. § 1341 and in no way expands, amends or varies from the language of the indictment, which charges the defendant with devising a scheme for the pur-

[10] The pertinent language in Instruction No. 8 is as follows:

One: The defendant, Brenda Lu Smith, knowingly devised a scheme or artifice to obtain **or attempt to obtain** money or property by means of false or fraudulent pretenses or representations substantially as detailed in Instruction No. 2;

Two: The defendant, Brenda Lu Smith, did so with intent to defraud; and

Three: In advancing or furthering, or carrying out this scheme to obtain **or attempt to obtain** money or property by means of false or fraudulent pretenses or representations, the defendant, Brenda Lu Smith, used the mails or caused the mails to be used.

pose of obtaining money.[11] The language in the indictment and in Instructions 8 and 9 is internally consistent and in accordance with the statutory elements of 18 U.S.C. § 1341.

Defendant next contends that Instruction No. 10, which gives the definition of "false or fraudulent pretenses or representations," is erroneous due to the inclusion of the terms "reckless indifference" and "half-truths." The instruction as given is taken directly from Devitt, Blackmar & O'Malley, *Federal Jury Practice and Instructions*, Vol. 2, § 40.13 (1990). The Tenth Circuit has expressly approved the inclusion of reckless indifference in the definition of fraud and false statements. *United States v. Mackay*, 491 F.2d 616 (10th Cir. 1973). Defendant has cited no authority that indicates this circuit would not approve of the language as given in Instruction No. 10 as a proper definition of "false or fraudulent pretenses" in the mail fraud context.

With respect to the money laundering counts, defendant contends that Instructions 14 and 15 were erroneous due to the inclusion of the jurisdictional element contained in the statutory language. The court finds that inclusion of the statutory jurisdictional element in the instructions was proper, and that the money laundering instructions as a whole made clear the required elements the jury must find to sustain a conviction.

[11] Defendant argues that because the government charged in the indictment that defendant devised a scheme "to obtain" money, it is foreclosed from a jury verdict based on a finding defendant had devised a scheme "to attempt to obtain" money. Such an argument ignores the established law that the success of a fraudulent scheme is not an element of § 1341. *See United States v. Aigbevbolle*, 827 F.2d 664, 666 (10th Cir. 1987). The court can find no authority for the proposition that the government, by using the words "to obtain" money in the indictment, is thereafter forced to prove that a defendant did actually succeed in obtaining money. In *Aigbevbolle*, the indictment charged that appellant "did devise and did intend to devise a scheme and artifice to defraud, and to obtain money . . ." *Id.* at 665. Defendant's conviction for mail fraud was upheld even though he did not actually obtain any money, and in fact it would have been factually impossible for him to obtain money through his alleged scheme.

Defendant objects to instruction No. 28 because it advises the jury to first decide whether the 404(b) evidence is accurate before considering the evidence for the specified limited purposes. Defendant claims the limiting instruction "forced the jury to focus specifically on the 404(b) evidence in derogation of its general ability to pick and choose the evidence it will rely upon, thus, elevating the 404(b) evidence to a special status when compared with other evidence presented in the case." The court disagrees. The instruction given by the court is a common sense approach. It tells the jury to ignore the evidence if they do not find it accurate, and if they do find it accurate it instructs them to consider it only for the listed limited purposes. The instruction further cautions the jury that they cannot convict a defendant simply because they believe she committed uncharged bad acts. Instruction No. 28 read in its entire context and considered as part of the entire charge was appropriate.[12]

Defendant alleges that it was error for the court not to give defendant's proposed good faith instruction. *United States v. Hopkins*, 744 F.2d 716 (10th Cir. 1984) provides that if the defense of good faith has been interposed, the defendant is entitled to an instruction directly on the issue provided there is sufficient evidence to support the theory and such an instruction is requested. The court stated that "in mail fraud cases there is sufficient evidence when the jury could reasonably find from such evidence that the defendant in good faith believed that the plan would succeed, that the promises would be kept and the representations carried out." *Id.* at 718.

[12] The suggested instruction given by defendant in her supplemental memorandum instructs the jury that "where proof of an alleged earlier act of a like nature is established by evidence" the jury may draw inference from it. This does not differ materially from the instruction given by the court.

The evidence presented at trial did not warrant a good faith instruction. In fact, the court finds that defendant's proffered defense is not analogous to a good faith defense. Defendant basically argues that she was merely trying to float a loan through the use of her American Express card, and was not involved with the scheme as alleged by he government at all (or that in fact the scheme alleged by the government never existed). The good faith defense cases involve situations where the defendant embarks on a plan, without fraud at the inception, and in good faith believes that the representations made would be kept and carried out. *See United States v. Hopkins*, 744 F.2d at 718. The defense propounded by defendant is simply not analogous to that situation.

Defendant also contends the court erred in its failure to give the jury a specific instruction regarding the credibility of a drug and alcohol abuser as to the testimony of witness Paul Helms. The court found that there was not sufficient evidence to classify Mr. Helms as an addict, nor was there any evidence that he was addicted to or using drugs during the time of the events he testified about. It is the court's belief that a specific instruction should not be given every time an allegation of drug or alcohol abuse is made, but only upon an evidentiary showing as to the seriousness of the addiction and its propensity to affect credibility. No such evidentiary showing was made by defendant. Additionally, given the cross-examination of Mr. Helms regarding his drug use, the court finds that the witness credibility instructions given were sufficient to prevent prejudice to the defendant.

D. Governmental Misconduct

Defendant for the first time raises a governmental misconduct argument, relating to a case agent's interview of JoAnn Gustin during the investigative phase of the case. The court finds the articulated basis for this motion to be so specu-

lative, vague and ambiguous that it does not meet the standard that the misconduct be "grossly shocking and so outrageous as to violate the universal sense of justice." *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991). Accordingly, defendant's motion for a new trial on the grounds of governmental misconduct is denied.

E. Spoliation of Evidence

In her post-trial motion defendant for the first time makes an argument that she was prejudiced in her ability to develop her theory of the defense by the fact that Globemaster's computer-generated weekly sales reports were destroyed by the ARC. Defendant contends that her inability to analyze and present those reports, which contained exculpatory material, prejudiced her ability to construct a defense and, thus, denied her a fair trial.

The court believes that such an argument is misplaced based on the evidence presented in the case. The evidence was that the "weekly report" submitted to ARC consisted of: the agent's ticket coupon for sold tickets; the complete ticket coupons for tickets refunded or exchanged; cash refund and exchange notices; and a calculator tape of total sales, refunds and remittances. The evidence was that ARC acted as a clearinghouse and sent the tickets and associated documents on to the respective airlines. These original documents were maintained by the airlines and admitted into evidence. With respect to any computer generated reports that were prepared by Globemaster, the evidence was that ARC would consider this to be surplusage because ARC was required by contract to create its own computer generated report based upon the original documentation provided by the travel agent. Thus, any work product materials prepared by the travel agency on its own computer were of no use to the ARC or the airlines. ARC did not deviate from its normal practice by not retaining

any such work product material, if in fact it ever received such material in the first place.

F. Ineffective Assistance of Counsel

Defendant has also raised an ineffective assistance of counsel argument in her post-trial motions. Defendant argues that her trial counsel made certain prejudicial errors including his failure to object to the indictment, failure to attack the credibility of certain witnesses, and the failure to raise and object to certain jury instructions. Defendant contends that as a result of trial counsel's ineffective assistance the defendant was deprived of her rights to counsel and a fair trial.

Counsel for defendant has requested guidance from the court as to the proper procedural method to pursue defendant's ineffective assistance of counsel claim. This case is somewhat unique factually in that defendant has made a change of attorneys immediately following trial and prior to the court's ruling on post-trial motions and sentencing of the defendant. Thus, defendant is making an ineffective counsel argument at the post-trial motion stage of the proceedings. In a normal situation, a defendant will not realize that he or she has a potentially meritorious ineffectiveness claim until a later point, such as when he or she has retained new counsel on appeal.

The Tenth Circuit has quoted with approval the general rule that "a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court." *Beaulieu v. United States*, 930 F.2d 805, 807 (10th Cir. 1991), *quoting United States v. Higdon*, 832 F.2d 312, 313-14 (5th Cir. 1987), *cert. denied* 484 U.S. 1075 (1988). The circuit court has noted that this "encourages development of a record on the tactical reasons for trial counsel's decisions, the extent of trial counsel's alleged deficiencies, and the asserted prejudicial impact on the outcome of the trial."

Beaulieu, 930 F.2d at 807.

The Tenth Circuit has also stated that the preferred avenue for challenging the effectiveness of defense counsel in a federal criminal trial is by collateral attack under 28 U.S.C. § 2255. *Id.* at 806. However, if post-trial proceedings develop a factual record of sufficient depth and detail for review of "the tactical reasons for trial counsel's decisions, the extent of trial counsel's alleged deficiencies, and the asserted prejudicial impact on the outcome of the trial," the court may resolve the matter on direct appeal. *U.S. v. Maxwell*, 966 F.2d 545, 547 (10th Cir. 1992).

The court finds that due to the present factual posture of the case, defendant's ineffective assistance of counsel argument should be pursued by collateral attack under 28 U.S.C. § 2255. Although defendant's new counsel has raised the ineffective assistance of counsel argument, defendant's new counsel notes in the post-trial motions that he has "not had the opportunity to review the record in sufficient detail to adequately identify the nature and scope of this issue." Defendant's new counsel has also stated that resolution of this issue will require the court to conduct an evidentiary hearing. The court finds that it is not possible to develop a factual record of sufficient depth and detail through these post-trial proceedings to allow this court to make a proper ruling on the issue and have such decision be ripe for possible review by the circuit court. Therefore, the court finds that defendant should pursue her ineffective assistance of counsel argument by means of collateral attack under 28 U.S.C. § 2255.

IT IS, THEREFORE, ORDERED BY THE COURT THAT defendant's motion for judgment of acquittal or, in the alternative, for new trial (Doc. # 218) is granted in part and denied in part. Defendant's motion is granted as to Count 8 of the indictment, which charged defendant with wilful fail-

ure to file a corporate income tax return. Count 8 is dismissed due to insufficiency of the evidence. Defendant's motion is denied on all other grounds. The court declines to consider defendant's ineffective assistance of counsel argument at this time. Such argument may properly be made pursuant to 28 U.S.C. § 2255.

IT IS FURTHER ORDERED that defendant's motion for reconsideration of order of forfeiture (Doc. # 22) is denied and defendant's alternative motion for extension of time to file notice of appeal (Doc. # 223) is moot.

IT IS SO ORDERED.

Dated this **27th** day of April, at Kansas City, Kansas.

/s/ JOHN W. LUNGSTRUM
John W. Lungstrum
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[FILED: 9/16/93]

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. 92-20011-01
BRENDA LU SMITH, Defendant.	)	

FINAL ORDER OF FORFEITURE

WHEREAS, on December 17, 1992, this Court entered an Order of Forfeiture pursuant to the provisions of 18 U.S.C. §§ 1957 and 982 and 21 U.S.C. § 853(n) based upon the trial jury's Guilty Verdict against the above defendant on Counts 4, 5 and 6, and the trial jury' s Special Verdict forfeiting all of the property alleged to be subject to forfeiture in Count 7 of the Superseding Indictment;

AND WHEREAS, on June 23, June 30 and July 7, 1993, the United States published in a newspaper of general circulation notice of this forfeiture and of the intent of the United States to dispose of the property in accordance with the law and further notifying all third parties of their right to petition the Court within thirty (30) days for a hearing to adjudicate the validity of their alleged legal interest in the property;

AND WHEREAS, the Court has been advised that the Airlines Reporting Corporation filed a timely petition asserting a legal interest in $128,177.00 and that the United States will recognize the interest of the Airlines Reporting Corporation as the victim of the mail fraud in Counts 2 and 3 and whose funds were laundered in Counts 4, 5 and 6, the basis for Count 7 of the Superseding Indictment.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that the United States Marshal forthwith release $128,177.00 to the Airlines Reporting Corporation.

It is further ORDERED, ADJUDGED and DECREED:

1. That the right, title and interest to the $128,177.00 that the Court ordered forfeited on December 17, 1992, is hereby condemned, forfeited and vested in the United States of America, and pursuant to 18 U.S.C. § 982(b)(1)(A) and 21 U.S.C. § 853(i)(1) is restored and remitted to the Airlines Reporting Corporation.

The Clerk is hereby directed to send copies of this Order to all counsel of record and the United States Marshal.

SO ORDERED this *16th* day of *September*, 1993.

JOHN W. LUNGSTRUM
U.S. DISTRICT JUDGE

INSTRUCTION NO. _____

The good faith of the defendant, Brenda Lu Smith, is a complete defense to the charge of mail fraud contained in Counts 2 and 3 of the indictment because good faith on the part of the defendant is, simply, inconsistent with the intent to obtain money or property by means of false or fraudulent pretenses or representations alleged in that charge.

A person who acts, or causes another person to act, on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong. An honest mistake in judgment or an error in management does not rise to the level of intent to defraud.

A defendant does not act in "good faith" if, even though she honestly holds a certain opinion or belief, that defendant also knowingly makes false or fraudulent pretenses or representations to others.

The mail fraud statute is written to subject to criminal punishment only those people who knowingly obtain money or property by means of false or fraudulent pretenses or representations.

While the term "good faith" has not precise definition, it means, among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another.

In determining whether or not the government has proven that the defendant acted with an intent to defraud and to obtain money or property by means of false pretenses or representations or whether the defendant acted in good faith, the jury must consider all of the evidence in the case bearing on the defendant's state of mind.

The burden of proving good faith does not rest with the defendant because the defendant does not have any obligation to prove anything in this case. It is the government's burden to prove to you, beyond a reasonable doubt, that the defendant, Brenda Lu Smith, acted with the intent to defraud and to obtain money or property by means of false pretenses or representations.

If the evidence in the case leaves the jury with a reasonable doubt as to whether the defendant acted with an intent to defraud and obtain money or property by means of false pretenses or representations or in good faith, the jury must acquit the defendant.

Devitt, Blackmar, and O'Malley, **Federal Jury Practice and Instructions**, Sec. 40.16, pp. 531-532 (1990).

United States V. Hopkins, 744 F.2d 713 (10th Cir. 1984) (evidentiary support requires submission)